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IN THE

Supreme Court of the United States

October Term, 1970
No. 695

COUNTY OF SANTA BARBARA, *et al.*,

Petitioners,

vs.

ROBERT J. MALLEY, *et al.*

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

Petitioners move the Court to defer consideration of the petition for writ of certiorari. (*Brown v. United States,* .... U.S. ...., No. 5497 O.T. 1970, 30 U.S. Law Week 3167; *Murray v. City of New York,* 308 U.S. 528, 310 U.S. 610, 311 U.S. 720.) The reasons for the motion are these:

1. Among the matters pending before the District Court, Central District of California, in the two *Hickel* (now *Russell* [Rule 25(d), Federal Rules of Civil Procedure]) cases (*County of Santa Barbara v. Russell,* No. 69-636, *Weingand v. Russell,* No. 69-1317) are plaintiff's motions for preliminary injunction to require the holding of hearings, with access to information, before the Secretary of the Interior authorizes further major significant oil activity in the Santa Barbara Channel and to require him, before making such decisions, to comply with the National Environmental Policy Act. The motions for preliminary injunction are based on the ground of repugnancy to the Constitu-

tion of the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*), on denial of due process (including the equal protection guarantee thereof) in the refusal of the Secretary of the Interior to afford a hearing, and on the ground that the National Environmental Policy Act of 1969 (42 U.S.C. 4331 *et seq.*), enacted subsequent to the filing of the lawsuits, requires certain action by the Secretary, including the holding of hearings, before such major decisions are made.

In the two *Russell* cases, a three-judge court has been convened. The order of that court, either granting or denying the preliminary injunction, is appealable to this Court. (28 U.S.C. 1253.) Accordingly, those two cases should shortly be before this Court. (It is assumed the losing side will appeal. Plaintiffs will, should their motion be denied. If the preliminary injunction is granted and defendants do not appeal [an unlikely happening] the instant petition would probably be moot making decision thereon unnecessary.)

Prominent among the issues before the District Court is the applicability of the National Environmental Policy Act to the major decisions the Secretary of the Interior is required to now make in the Santa Barbara Channel, (having in mind the blow-out of January, 1969) as well as the proper construction of that Act vis-a-vis whether hearings are required under it before those decisions are made. Though not a "repugnancy" issue within the meaning of the 3-judge court statute (28 U.S.C. 2282), the issue is squarely before that court which has jurisdiction to decide it (*United States v. Georgia Public Service Corporation*, 371 U.S. 285, 287-288) and it can be expected that it will.

Of course, the applicability and construction of the Environmental Policy Act could be decided by this Court in the instant petition. (*Ziffren v. United States*, 318 U.S. 73, 78.) But it is preferable, we would think, that the matter first be explored by the lower court so that on review this Court would have the benefit of the record made in that court and of that court's views. Indeed, when intervening legislation or regulations occur, this Court often remands for the lower court to consider the case in the light of that change. (*Thorpe v. Housing Authority of the City of Durham*, 386 U.S. 670.)[1] Since that consideration is now momentarily to take place in the District Court, it would be appropriate, we submit, for this Court to await that court's ruling and then pass upon the whole case, including the presently pending petition, on review of that judgment.

2. We believe the lower court was mistaken in passing to the three-judge court *all* "constitutional" issues. (Pet. Appx. 17.) See *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383. But having done so, and since, presumably, the three-judge court will now pass on all of them, it would likewise be preferable, from a mere man-hour consideration, for this Court to await the three-judge court ruling rather than remand the instant cases for what will then be a dual determination.

3. Likewise, in our mind, the Court of Appeals was in error in holding that the Regulations, properly

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[1]Though the National Environmental Policy Act was extant while these cases were before the Court of Appeals, the impact of that Act was urged before that Court. This, quite candidly, because counsel for petitioners did not appreciate the thrust or impact of the Act until Judge George L. Hart, Jr.'s ruling in *Wilderness Society v. Hickel*, ... F. Supp. ...., 1 E.R. 1335 (DC DC 1970).

interpreted, do not require the Secretary to hold public hearings when so large a public interest is at stake as was, and is, the case as to the future of oil activity in the Santa Barbara Channel following the blowout. The Regulations do so provide and if they do not, the Constitution does, both as a matter of due process and as a matter of equal protection as encompassed within the 5th Amendment. The regulations clearly give hearings and due process to the oil companies (e.g., 30 C.F.R. 250.81; Pet. Appx. 31-32), including judicial review. (30 C.F.R. 250.82; Pet. Appx. 32.) They are, we concede, "interested parties". (30 C.F.R. 250.11; Pet Appx. 30). But so also are the members of the public, at least those who, as here, are the local government entities and citizens living and working on the sea coast vitally affected by the activity. See Appendix to Petitioners' Reply to Oppositions to Petition for Writ of Certiorari.

These being injunction suits which look to the future, this Court is faced with the question as to whether petitioners are entitled to a preliminary injunction as of now. (*Douglas v. City of Jeannette*, 319 U.S. 157, 163.) The presence of the National Environmental Quality Act makes it necessary, therefore, that that act be considered in determining that question, including whether that Act, interpreted as it has been by the President [Ex. O. 11514; 35 Fed. Reg. 4247; §2[b]] to encompass hearings, requires a hearing now, before, for example, the Secretary passes on the application pending before him for the Santa Ynez Unit, a unitization application covering some 86,000 acres of Channel area and requesting drilling in waters deeper than has ever been done before. (See Reply to Oppositions to Petition for Writ of Certiorari, p. 7). In-

deed, with changes occurring so often, as they have during the course of this litigation, there is no doubt that the new Secretary of the Interior will be considering afresh the whole question of the future of the channel. In that consideration, as the Environmental Quality Act envisages, the public, and, particularly, the local entities, must be heard.

All these matters will be urged upon the District Court when it hears the injunction applications. We have requested, indeed pleaded with, the District Court for an early hearing. We therefore urge this Court to defer consideration of the petition for writ of certiorari to await that court's disposition of the injunction applications.

Respectfully submitted,

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APPENDIX.

Argument Showing How the Regulations of the Department of the Interior Require Public Hearings.

The court below, incorrectly we submit, rejected petitioners' contention that, properly construed, the regulations, even before the Environmental Policy Act, granted and grant the public the right to a hearing. Petitioners' argument is that Regulations recognize the rights of "interested" parties (30 C.F.R. 250.11; Pet. Appx. 30); that persons and public entities such as petitioners are, in the very nature of things, "interested parties"; that any operations that are allowed must be so conducted as "to prevent damage to, or waste or (sic) any natural resource or injury to life or property;" (30 C.F.R. 250.12[a]; Pet. Appx. 30-31) to this end, it is expressly provided that an appeal from any order of the District Supervisor may be taken to the Director of the United States Geological Survey with provision for written argument both on the facts and the law, with a similar appeal thereafter permitted to the Secretary, likewise on the facts and the law (30 C.F.R. 250.81[a][b][c]; Pet. Appx. 31-32); that before any of these officers, the supervisor, the Director, the Secretary, oral argument may be permitted on motion at a time to be fixed by the officer (ibid, subdivision [c]). And, finally, that provision is made allowing "any interested party" to seek judicial review. (30 C.F.R. 250.82, Pet. Appx. 32.) From this regulatory scheme, petitioners contend they are entitled to hearing just as much as are the oil companies. That if the regulations are not so construed, petitioners are denied due process of law under cases of this Court such as those cited at page 10 of their petition. Peti-

tioners additionally contend that if the regulations are not read to afford them a hearing while affording it to the oil companies, they are invidiously—and therefore unconstitutionally—being discriminated against within the equal protection principle established by cases such as *Kramer v. Unified Free School District*, 395 U.S. 621 and *Cipriano v. City of Houma*, 395 U.S. 701, where this Court invalidated legislation which allowed only property owners or parents to vote on municipal bonds (which would be paid for by property taxes). There it was held there was no compelling state interest sufficient to justify preventing others—albeit not so closely connected, pocketbook-wise—from this participation in public affairs. In a sense the scheme of the legislation in those cases was a denial of the right to petition the government for redress of grievances—the same interest which is present at bar.

Further support for petitioners' argument that the regulations, properly construed, call for a hearing in the post blowout Santa Barbara Channel situation is seen from the fact that the regulations, in haec verba, call for hearings when the question of leasing new tracts is involved. (43 C.F.R. 3381.4; Pet. Appx. 35.) It is no answer to say that the regulation just mentioned has to do with pre-leasing, while at bar the situation is post leasing. As the Council on Environmental Quality pointed out (1st Annual Report, pg. 11), the decision to permit oil drilling in the Santa Barbara Channel was based primarily on the value of the development of the oil resources. "The commercial, recreation, esthetic, and ecological values . . . were largely ignored." With the happening of the blowout, and the knowledge which is available as a result thereof, there is no longer any reason to ignore these values in de-

termining what to do in the Channel in the future. This is especially so since the U. S. G. S. up to now, at least, has relied for its information on what the oil companies have supplied to it. The other interested parties—the public and the property owners affected—should now be heard. To shut the public out is a misreading of the tenor of the whole legislative and regulatory scheme.